Supreme Court, U.S.
FILED
06-423 SEP 16 2006
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No. 06-

IN THE

Supreme Court of the United States

DAVID J. CAUCCI, M.D.,

Petitioner,

v.

LAWRENCE MEKIC and LOUISE MEKIC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a summary finding of criminal contempt and imposition of a penalty as a result of a non-litigant's exercise of her First Amendment rights, outside the courtroom, violates the First Amendment to the United States Constitution's guarantee of the right to free speech and the Fourteenth Amendment to the United States Constitution's protection of the right to due process.

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STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

1. The First Amendment to the United States Constitution.

2. The Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner prays the United States Supreme Court will grant a Writ of Certiorari to review the Order of the Pennsylvania Supreme Court dated June 22, 2006 denying Petitioner's Petition for Allowance of Appeal.

Lawrence and Louise Mekic ("Respondents") initiated proceedings against Dr. David J. Caucci ("Petitioner") on March 28, 2001, alleging medical malpractice, in the Lackawanna County Court of Common Pleas.

On January 18, 2005, a panel of twelve jurors and two alternates were empanelled for the trial. The court instructed the panel as to the duties of jurors in general and specifically as to the duty not to discuss the trial with anyone outside the

jury room or read any materials concerning either the issues raised at trial or the parties involved. No prior instruction was given to Petitioner or to his non-party spouse during the pretrial life of the case.

That evening, January 18, 2005, the evening edition of the *Scranton Times* contained a letter to the editor written by Petitioner's wife ("Mrs. Caucci"), entitled "Malpractice Suits A Major Drawback" (the "Letter"). The Letter was submitted a week before the trial in response to an article submitted by a Scranton lawyer that, in the opinion of Mrs. Caucci, misquoted and falsely reported a well published study on medical malpractice litigation. While the Letter to the Editor discussed a recent survey on medical malpractice, it did not reference Respondents' suit against Petitioner or the issues in the case and it did not mention either Petitioner or Respondent. Mrs. Caucci is not an employee of the paper. There is no evidence in the record that Mrs. Caucci intended the Letter to impact Respondents' suit against Petitioner in any way, nor is there any evidence to suggest that it was ever seen or read by a single juror.

On January 19, 2005, Respondents moved for a mistrial on the grounds that Mrs. Caucci's letter to the editor had prejudiced the jury. Without permitting Petitioner a hearing, or the opportunity to consult with counsel, and without polling the jury to determine if, in fact, the jury had been tainted, the trial court declared a mistrial and held Petitioner in criminal contempt. Petitioner was denied essential due process protections, including notice and a hearing. There is no record evidence indicating that Petitioner had anything at all to do with, or prior knowledge of, the Letter. The trial court summarily held Petitioner in criminal contempt and entered an oral order directing him to personally pay

Respondents' attorneys' fees and costs. The court instructed Petitioner's defense counsel in the malpractice action that Petitioner's insurer could not pay the sums due under the contempt order. The court never reviewed the doctor's policy as to the insurer's policy obligation to pay counsel fees and costs assessed as a sanction.

After retaining outside counsel, Petitioner moved to strike the criminal contempt conviction. *See* Memorandum of Law in Support of Defendant's Motion to Strike the Court's February 4, 2005 Order, attached as Exhibit A. After settlement discussions convened by the judge in chambers months later, Respondents agreed to withdraw their claim for attorneys' fees. However, a similar agreement was not reached as to Respondents' costs. At that discussion in chambers, counsel for Petitioner informed Judge Corbett that Petitioner would not agree to pay the contempt assessment and wished to litigate the finding of cont mpt, but if Petitioner's insurance carrier chose to pay them, Petitioner could not stop them. The argument on the motion to strike the contempt, which required Petitioner to pay $13,286.50 in costs to Respondents, was again put off by the trial judge.

On August 5, 2005, the Honorable Trish Corbett entered the Trial Court Order without ever conducting a hearing, without any sort of record, and without otherwise affording Petitioner a chance to defend himself against any charges or creating a record of any kind. *See* Trial Court Order, attached as Exhibit B. In view of the fact that no evidence was ever elicited that the jury was aware of the letter and/or was tainted and that he was deprived of his due process right to a hearing to present evidence in his defense, Petitioner thereafter filed a Notice of Appeal from the Trial Court Order.

On February 4, 2005, the court formally entered the Contempt Order directing Petitioner to pay Respondents' trial costs. On February 14, 2005, Petitioner filed a motion to strike the Contempt Order. On August 5, 2005, the court, again without a hearing or evidence, entered the Order affirming both the Contempt Order and the award of costs in the amount of $13,286.50. On September 6, 2005, Petitioner filed a Notice of Appeal. On October 26, 2005, Respondent filed a Motion to Quash/Dismiss the Appeal. The Superior Court of Pennsylvania, again without a hearing or oral argument, issued a *Per Curiam* Order on December 8, 2005, quashing the appeal.

Petitioner moved for reconsideration; the application was denied. There was no valid finding of contempt for reasons set-forth in Petitioner's Motion for Reconsideration. *See* Motion for Reconsideration, attached as Exhibit C. Petitioner was held in contempt for something he did not do and without any prior order or notice to him. On December 22, 2005, Petitioner filed an Application for Reconsideration/Re-argument. The application was denied by the Pennsylvania Superior Court in another *Per Curiam* Order. On March 14, 2006, Petitioner filed an Application for Allowance of Appeal with the Pennsylvania Supreme Court, which was denied on June 22, 2006. The Writ of Certiorari should be granted to correct a gross violation of Petitioner's rights and the first amendment rights of his wife.

Although contempt orders are reviewed under an abuse of discretion standard, the orders will be disturbed if there existed an error of law or a clearly erroneous finding of fact. *Harris v. City of Philadelphia*, 47 F.3d 1311 (3d Cir. 1995). In this case, the lower court made serious and manifold errors of both law and fact. The court made an error of law when it

entered an order finding Petitioner guilty of criminal contempt without notice, without an opportunity to retain criminal counsel, without a hearing and without any inquiry as to Petitioner's knowledge or awareness of his wife's conduct. The court committed an error of law when it held Petitioner guilty of criminal contempt for his wife's lawful exercise of her first amendment rights. The court committed an error of law when it took no action against the billboards, letters to the editors and other publications, TV and radio announcements rampant at the time of the trial advocating against tort reform and yet chose to silence Petitioner's wife, who can no longer express her adverse opinions publicly for fear of further reprisals against her and her husband.

The court committed an error of law when it ordered the defense counsel retained to represent Petitioner in the alleged malpractice case to advise the insurance carrier that it was banned from participation and could not pay the fines imposed. That counsel was the only counsel in the room when the finding of contempt was made without any opportunity for Petitioner to speak on his own behalf. The court made an error of law in imposing criminal contempt sanctions against Petitioner for conduct not undertaken, approved, aided or abetted by Petitioner. The conduct at issue was in fact undertaken by Petitioner's wife outside the courtroom, without any intent to affect the proceedings and in furtherance of her constitutional right to address public issues.

The court made a second error of law in imposing a criminal contempt sanction in absence of any record evidence or procedural protections, thereby violating Petitioner's due process rights. The court made a third error of law in summarily imposing criminal contempt sanctions for

allegedly contemptuous acts which occurred outside the courtroom, a violation of both federal and state law.

The court made an error of fact in using as its sole justification for its outrageous conduct the fictitious contention that Petitioner admitted to harboring an intention to disrupt the judicial proceedings; Petitioner never made any such admission, and the record is utterly devoid of any suggestion that such a statement was ever made. In sum, the court's behavior in imposing criminal contempt sanctions against Petitioner for his wife's exercise of her First Amendment rights outside the courtroom is so outrageous, and constitutes such a departure from the usual and accepted course of judicial proceedings, as to call for an exercise of this Honorable Court's power of supervision.

REASONS FOR GRANTING THE PETITION

The Pennsylvania Supreme Court erred in denying Petitioner's due process rights by affirming the Pennsylvania Superior Court's deprivation of the procedural protections established under the Constitution. The presumption of innocence obtains in criminal contempt proceedings. *Michaelson v. United States*, 266 U.S. 42 (1924). The Supreme Court of the United States has long recognized that criminal contempt is a crime in the ordinary sense, and criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of criminal proceedings. Those protections include the right to notice of charges, to assistance of counsel, to summary process, and to present a defense. *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994) citing *Cooke v. United States*, 267 U.S. 517 (1925). Petitioner was not afforded a single one of these rights.

A. *Petitioner Was Denied The Right To Notice Of The Charges*

Criminal contempt "may be prosecuted only on notice which states the time and place of hearing and gives a reasonable time for preparation of a defense and states the actual facts constituting the contempt charged and which describes it as such." *Cliett v. Hammonds*, 305 F.2d 565 (5th Cir. 1962), Fed. Rules Crim. Proc. Rule 42. Among the purposes the procedural protections were designed to serve is the fundamental principle that one who is charged with a crime is entitled to be informed of the nature of the charge against him. *Hicks on behalf of Feiock v. Feiock*, 485 U.S. 624 (1988) citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911). The trial court met with counsel in chambers, learned of the Letter and announced the contempt decision. Petitioner was not even present. The judge returned to the court room and announced her finding of contempt without granting any opportunity to speak to Petitioner. The court declined to take even the most elementary steps to justify its suspicions regarding Petitioner. It failed to identify a single act or omission on the part of Petitioner, either in or out of court, that could be construed as constituting criminal contempt of court. The court refused to poll the jury to determine if any juror had seen the Letter and/or was prejudiced by it.

First and foremost, in imposing the criminal contempt sanctions, the lower court failed to identify a shred of evidence that Petitioner did anything wrong. The publication, out of court, of an article authored by his wife, that neither referenced the judicial proceedings, nor Petitioner, nor Respondents, nor the Court, is the sole source of the lower court's ire. Petitioner neither assisted in the drafting of the

Letter nor procured or requested its publication. Petitioner is, to this day, in the dark as to the nature of the charge *against him*.

B. ***Petitioner Was Denied The Assistance Of Counsel***

Petitioner was also deprived of the right to assistance of counsel to defend against the charge of criminal contempt and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation, or in extenuation of the offense and in mitigation of the penalty to be imposed. *Cooke*, 267 U.S. 517. This deprivation of Petitioner's rights was made especially egregious by the fact that, in cases where the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on guilt or the penalty to be imposed, the court cannot exclude evidence in mitigation, as it did in this instance. *Id.* Nothing in the record suggests that either Petitioner or Mrs. Caucci acted with the intent to disrupt proceedings. Submitting a letter to an editor to correct perceived false information is protected free speech. Likewise there is no assurance that the letter will be selected for publication. It is public knowledge that tort reform has been a public issue in Pennsylvania in the years prior to the facts in question. Every citizen who must vote on such issues is entitled to speak about them. Petitioner had a right to explore the issue of the court's violation of First Amendment rights in his defense and to prevent the contempt order which in reality is a "gag" order against his wife.

A party must be represented by counsel and have the opportunity to purge himself of contempt. *Harris v. United States*, 382 U.S. 162 (1965). Both Petitioner's personal and professional reputation have suffered as a result of the court's

baseless actions which have been widely publicized in upstate Pennsylvania. Recognizing the potential for such harm, and seeking to prevent it, the Third Circuit has held that criminal contempt proceedings must comport with Federal Rule of Criminal Procedure 42(b), which requires such proceedings to be "prosecuted on notice . . . stat[ing] the time and place of hearing, allow[ing] a reasonable time for the preparation of the defense . . . stat[ing] the essential facts constituting the criminal contempt, and describing it at as such." *United States v. Pozsgai*, 999 F.2d 719 (3d Cir. 1993).

The process afforded Petitioner served to deny him every one of these rights, and in lieu of such rights, the court declared its decision and deprived him of a hearing where he could be represented by counsel and afforded the opportunity to mount any defense against the charges. Summary disposition is permitted only in exceptional circumstances, where necessary to achieve vindication of a court's dignity and authority. *Harris*, 382 U.S. 162. Nothing in the record suggests that any exceptional circumstances existed to warrant the summary imposition of the Contempt Order.

C. *Petitioner's Conduct Did Not Constitute Contempt*

One of the most basic failings of the lower court was the failure to establish that any action or inaction on the part of Petitioner in fact constituted criminal contempt. Pennsylvania courts require significant disruptions of the orderly judicial process for a finding of contempt. *Commonwealth v. Jones*, 700 A.2d 1008 (Pa. Super. Ct. 1997). A significant disruption has been defined as one posing actual, imminent prejudice to a fair proceeding or to preservation of the court's authority. *Commonwealth v. Garrison*, 386 A.2d 971 (Pa. 1978). This

danger must not be remote or even probable; it must immediately imperil the participants in the courtroom. In the instant case, the conduct at issue was that of Mrs. Caucci, was taken outside of the courtroom in the exercise of her First Amendment right to free speech, and did not address either the parties or the facts of the case. There is nothing to indicate that the publication of the Letter posed any actual, imminent threat or prejudice to the judicial proceedings, so as to justify the imposition of a Contempt Order, let alone a summary finding of criminal contempt without the procedural safeguards required by law.

The propriety of imposing criminal contempt sanctions depends upon whether punishment is necessary to vindicate the court's authority. *Taberer v. Armstrong World Industries, Inc.*, 954 F.2d 888 (3d Cir. 1992). The seriousness of the misbehavior has some bearing on whether conduct is materially obstructive so as to constitute criminal contempt, and mere disrespect, insult or affront to a court's sense of dignity are insufficient. *United States v. Thoreen*, 653 F.2d 1332 (9th Cir. 1981).

There is no suggestion anywhere in the record that any action or inaction on the part of Petitioner served to undermine the court's dignity or authority. Both Petitioner and Mrs. Caucci are unfamiliar with the legal process. No order was ever published by the court banning letters or discussion of the case. Indeed, there *could not be* such prior restraint. They did not violate the authority of the court.

Even assuming *arguendo* that the lower court could defend a claim that the Letter could in fact sully the dignity or authority of the court, Judge Corbett, despite a request to do so, did not trouble to poll the jury to inquire as to whether

a single juror had even read the Letter at issue. No evidence suggests that any juror read the Letter or was impacted by it in any way. Remarks that are injudicious, or even disrespectful, will not justify a summary conviction for criminal contempt of court. *Commonwealth v. Garrison*, 386 A.2d 971 (Pa. 1978). Petitioner said nothing. Summary imposition of the criminal contempt charge without notice, assistance of counsel, record evidence, or any opportunity to defend against the charge clearly violated Petitioner's constitutional rights. The court's *summary imposition* of the Contempt Order on the strength of facts that could not even establish that criminal contempt was ever committed is insupportable.

D. *No Proof Exists To Support the Criminal Contempt Order*

Criminal contempt penalties may not be imposed on someone who has not been afforded the Constitutional protections applicable to criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt. U.S.C.A. Const. Amend. 14; *Gompers*, 221 U.S. 418; *Michaelson*, 266 U.S. 42; *Hicks*, 485 U.S. 624; *Pozsgai*, 999 F.2d 719; *Waste Conversion, Inc. v. Rollins Environmental Services, Inc.*, 893 F.2d 605 (3d Cir. 1990); *Commonwealth v. Cameron*, 501 Pa. 572, 462 A.2d 649 (Pa. 1983).

To sustain a criminal contempt conviction under the statutory provision governing misbehavior obstructing administration of justice, proof beyond a reasonable doubt of the following elements must be present: misconduct, in the presence of the court, committed with the intent to obstruct proceedings, which obstructs the administration of justice. *Commonwealth v. Jones*, 700 A.2d 1008 (Pa. Super.

Ct. 1997); *Commonwealth v. Martorano*, 563 A.2d 1193 (Pa. Super. 1989); 42 Pa.C.S.A. 4132(3). In a criminal contempt proceeding, four elements must be proven beyond a reasonable doubt: (1) the order must be definite, clear, specific and leave no doubt or uncertainty in the mind of the person to whom it was addressed of the conduct prohibited; (2) the contemnor must have had notice of the specific order or decree; (3) the act constituting the violation must have been volitional, and (4) the contemnor must have acted with wrongful intent. *Diamond v. Diamond*, 715 A.2d 1190 (Pa. Super. 1998).

There must be record evidence to establish each of the four elements, "suspicions are not enough to hold someone in contempt of court." *In re Rubin*, 256 F. Supp. 874 (E.D. Pa. 1966), *rev'd, in part, on other grounds*, 378 F.2d 104 (3d Cir. 1967). Additionally, the burden is higher where, as in the instant case, the Order infringes upon First Amendment protections as well as due process rights. The Pennsylvania Superior Court has held that state action infringing upon political speech is subject to strict scrutiny, upheld only where the regulation is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Commonwealth v. Ashton*, 824 A.2d 1198, 1203 (Pa. Super. 2003) *See also Burson v. Freeman*, 504 U.S. 191, 197 (1992).

Similarly, there is no evidence that Petitioner ever acknowledged any intention to affect the judicial proceedings by means of the Letter, for the simple reason that no such evidence exists. The trial court referenced this imagined acknowledgment in issuing its Contempt Order; this acknowledgment was made out of whole cloth and certainly cannot serve to justify imposition of the Order.

E. *Willfulness of Alleged Contempt Must Be Proven*

One of the elements that must be proven beyond a reasonable doubt is the willfulness with which the criminal contempt was undertaken. Knowledge that one's act is wrongful and a purpose to nevertheless do the act are prerequisites to criminal contempt, as to most other crimes. "Willfulness," for purposes of assessing disobedience in the criminal contempt context, implies deliberate or intended violation, as distinguished from accidental, inadvertent, or negligent violation." *TWM Manufacturing Co., Inc. v. Dura Corp.*, 722 F.2d 1261 (6th Cir. 1983). In the instant case, no record evidence exists to support a charge that either Petitioner or Mrs. Caucci willfully committed any violation or disrupted judicial proceedings in any way.

All facts in conviction of criminal contempt of court must be proven beyond reasonable doubt. *Behr v. Behr*, 695 A.2d 776 (Pa. 1997). The element of willfulness is an essential component of criminal contempt and distinguishes civil from criminal contempt. *Waste Conversion, Inc.*, 893 F.2d 605; *Pennsylvania v. Local Union 542, International Union of Operating Engineers*, 552 F.2d 498, 510 (3d Cir. 1977). The mere failure to comply with a court's order, without more, is not sufficient to sustain a conviction for contempt because "the crime of criminal contempt requires a specific intent to consciously disregard an order of the court." *Id.* In the first instance, there is no Order from the Court in this case before the finding of contempt. Secondly, there is nothing in the record to suggest that Petitioner held a specific intent to engage in criminal contempt; indeed there is nothing to suggest that Petitioner had any specific intent to engage in any form of contempt, and thirdly, *there is no conduct by the Petitioner.*

In a contempt proceeding based on the alleged violation of an order of the court directed against the publication of comments reflecting upon the cause of action or defense of a criminal prosecution then before the court, when a reasonable doubt, either in fact or law, exists in a criminal or quasi criminal case, that doubt must be resolved in favor of the accused. *Waste Conversion, Inc. v.* 893 F.2d 605 citing *State v. Hazeltine*, 143 P. 436 (Wa. 1914). The abundance of reasonable doubt regarding the justification for and propriety of the Contempt Order must be resolved in favor of Petitioner.

F. ***Out of Court or "Indirect" Contempt***

The deprivation of all lawful procedural protections was compounded in this case by the fact that the alleged contempt occurred outside the courtroom. Where, as here, the alleged contempt at issue occurs out of court, further procedural protections are afforded. The historical underpinnings of this principle demonstrate the fundamental nature of the judicial principle involved. As stated in *Cooke*, "punishment without trial was so contrary to the usual and ordinarily indispensable hearing before judgment constituting due process that the assumption that the court saw everything that went on in open court was required to justify the exception; but the need for immediate penal justification of the dignity of the court created it. When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument." *Id.* at 395.

Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or

explanation. In those cases, the considerations justifying expedited procedures do not pertain. Summary adjudication of indirect contempt, of the kind imposed by Judge Corbett, is prohibited, and criminal contempt sanctions are entitled to full criminal process. *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 citing *Cooke*, *supra*.

> A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

Yates v. United States, 355 U.S. 66 (1957).

Contempt involving out of court disobedience often requires elaborate and reliable factfinding. *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994). For example, a "colloquy at which the contemnor may argue his . . . position is not sufficient to satisfy the strict procedural due process requirements that apply prior to a conviction for indirect criminal contempt." *Commonwealth v. Ashton*, 824 A.2d 1198, 1203 (Pa. Super. 2003). Alleged contempt committed beyond the court's presence where the judge has no personal knowledge of the material facts are considered especially suited for trial by jury. *Id.* A hearing must be held, witnesses must be called, and evidence taken in any event. Such contempt does not obstruct the court's ability to adjudicate the proceedings before it, and the risk of erroneous deprivation from the lack of a neutral factfinder may be substantial. *Id.* Under these circumstances, criminal procedural protections such as the rights to counsel and proof

beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power. *Id.* Not even the most basic protections required by law were afforded Petitioner, let alone the heightened protections accorded where the contempt alleged occurred out of court.

1. *Criminal Contempt Is More Circumscribed In Pennsylvania*

In 1978, the Pennsylvania Legislature specifically limited the courts' contempt powers, by Section 4132 of the Judicial Code, 42 Pa.C.S. § 4132. That statute circumscribed the power of the several courts of the Commonwealth to issue attachments and to impose summary punishments for contempt of court to the following cases: (1) the official misconduct of officers of such courts respectively; (2) disobedience or neglect by officers, parties, jurors or witnesses of or to the lawful process of the court; (3) the misbehavior of any person in the presence of the court, thereby obstructing the administration of justice. None of these cases is apposite to the instant case; therefore, summary imposition of the criminal contempt order was not justified by fact or law.

The Pennsylvania Supreme Court acknowledged this limitation in *Matter of Compolongo*, stating: "Although the law has long recognized the inherent power of the courts to impose summary punishment for contemptuous misconduct, that power has been limited in this Commonwealth by Section 4132." 435 A.2d 581, 583 (1981) citing *Behr v. Behr*, 695 A.2d 776 (Pa. 1997). The Contempt Order contravenes the clear intention of the Pennsylvania legislature to limit the imposition of the penalty to circumstances not present in the instant case.

G. *The Writ Of Certiorari Should Be Granted Because The Imposition Of The Contempt Order Was Arbitrary and Oppressive*

Exercise of the power of contempt is "a delicate one, and care is needed to avoid arbitrary or oppressive conclusions." *Cooke v. United States*, 267 U.S. 571 (1925). A court should not wield the criminal contempt sanction when less drastic measures will suffice. *Commonwealth v. Garrison*, 478 Pa 356, 386 A.2d 971 (1978). In the instant case, summary imposition of the contempt order on the basis of conduct undertaken by Petitioner's wife is precisely the type of abusive and oppressive order the courts and legislature have attempted to avoid through case law and legislation. Implicit in the opinions and legislation is the recognition that informal procedures undertaken by officials and designed to chill expression can constitute a prior restraint on speech. *Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County*, 544 U.S. 1301 (2005). A threat of prosecution or criminal contempt against a specific publication raises special First Amendment concerns, for it may chill protected speech much like an injunction against speech by putting that party at an added risk of liability. *Id.* Similarly, the threat of specific speech resulting in criminal sanctions without procedural protections would chill speech. An order not accompanied by notice, or a hearing, or any other of the necessary and usual safeguards of the judicial process bears many of the marks of a prior restraint. *Id.* at 1626.

In addition to the concern for First Amendment rights, courts guard the right to be free from spurious criminal charges, recognizing the harm such charges can impose. The right of a citizen "to be free of the stigma of an unfair or unfounded criminal conviction is a hallmark of American

jurisprudence; thus the right to be free from the taint of such a conviction is too important." *Diamond*, 715 A.2d at 1195. All citizens have the right to engage in political speech and to persuade their fellow citizens on matters of pending legislation and political action without fear of criminal prosecution and summary adjudication without procedural protections. *Commonwealth v. Ashton*, 824 A.2d 1198, 1203 (Pa. Super. 2003) *See Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) (noting universal agreement that a major purpose of the First Amendment was to protect political speech). "The Constitution specifically selected the press, which includes . . . newspapers, to play an important role in the discussion of public affairs." *Id.* at 219.

Similarly, the Supreme Court has held that gag orders, issued to protect the fairness of trial, are prior restraints on speech and, therefore, unconstitutional. *Commonwealth v. Ashton*, 824 A.2d 1198, 1203 (Pa. Super. 2003); *See also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565 (1976). The Contempt Order at issue in this case served as a gag order, prohibiting some ill-defined category of speech indefinitely, at the risk of criminal sanctions.

CONCLUSION

Through deprivation of notice, assistance of counsel, or record evidence of contempt to sustain the burden of proof, Petitioner was denied all opportunity to defend against the charges of criminal contempt summarily imposed by the trial court, which Order was wrongly sustained by the Pennsylvania Supreme Court. If such conduct on the part of the trial court is left unchecked, the effect could surely be to exercise a chilling effect on the free speech of persons associated with parties to litigation, in clear violation of the United States Constitution. This Honorable Court's intervention, to serve as a check to the unrestrained and unprincipled exercise of the trial court's order is required.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

APPENDIX A — MEMORANDUM OF LAW DATED FEBRUARY 14, 2005

IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY

CIVIL ACTION — LAW

NO. 1661-CIVIL-2001

LAWRENCE F. MEKIC and LOUISE MEKIC,

Plaintiffs,

vs.

DAVID J. CAUCCI, M.D.,

Defendant.

I. MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE THE COURT'S FEBRUARY 4, 2005 ORDER

II. MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR RECUSAL

Defendant, David J. Caucci, M.D., by and through his attorneys, Fox Rothschild LLP, hereby submits this memorandum of law in support of his Motion to Strike The Court's February 4, 2005 Order and in support of his Motion for Recusal.

Appendix A

A. FACTS AND PROCEDURAL HISTORY

On March 28, 2001, Plaintiffs commenced a medical malpractice action against David J. Caucci, M.D. ("Dr. Caucci") by writ of summons.[1] On January 18, 2005, a panel of twelve jurors and two alternates was selected and sworn in by the Court. The panel was instructed as to their duties as jurors, specifically their responsibility not to discuss the matter with anyone or to read anything relevant to the issues or parties involved.

That night, in the evening edition of the *Scranton Times*, an editorial was published, titled "*Malpractice Suits a Major Drawback*" (the "editorial"). The editorial was written by Elizabeth Caucci ("Mrs. Caucci"), Dr. Caucci's wife, in her capacity as Clarks Summit President of the Lackawanna County Medical Society Alliance.[2] Although advocating tort reform in the Commonwealth, Mrs. Caucci's editorial did not refer to this lawsuit or to the parties involved. Rather, the editorial responded to a recent article, published by the

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1. This memorandum of law, Defendant's Motion to Strike This Court's February 4, 2005 Order, and Defendant's Motion for Recusal are concerned solely with the Court's February 4, 2005 Order and with the Court's further participation in these proceedings; the underlying medical malpractice action and the issues raised therein are irrelevant to the issues at hand and, therefore, they are not addressed.

2. As Clarks Summit President of the Lackawanna County Medical Society Alliance, Mrs. Caucci regularly advocates the position of the medical community through the media. She has written numerous editorials on the subject of tort reform that have been published in the *Scranton Times*.

Scranton Times, in which Scranton attorney David Falk erroneously commented on a survey, conducted by the Keiser Family Foundation and the Harvard School of Public Health, concerning public perception of the importance of health care reform (the "Falk article"). Mrs. Caucci submitted her response to the *Scranton Times* approximately one week earlier and had no influence over when, or if, the article would be published. It was her intent to voice her opinion and the viewpoint of the Lackawanna County Medical Society Alliance as to certain general legislative proposals and to correct the misquotes in the Falk article. She did not intend to taint the jury selected in this case or to influence the outcome of trial and there is no proof to the contrary.[3]

The next day, on January 19, 2005, Plaintiffs' counsel presented the editorial to the Court, requesting default judgment or, in the alternative, a mistrial and payment of his attorneys' fees. While counsel did not complain about the Falk article, which favored his position and which appeared only days before the trial, he argued that Mrs. Caucci's editorial was a deliberate attempt to taint the jury and influence the outcome of trial. Dr. Caucci's attorney, John T. McGrath, Esquire ("Mr. McGrath"), asked the Court to poll

3. The Court's Order states, "Defendant, while not denying that the jury pool was tainted," *February 4, 2005 Memorandum and Order*, at p. 3, "Defendant did not deny that the published letter was meant to taint the jury," *Id.* at 5, "Defendant admitted the letter, at least in part, was designed to taint the jury," *Id.* at p. 6, and "it was admitted that the purpose of the letter was, at least in part, to taint the jury." *Id.* At all times, Dr. and Mrs. Caucci have denied this assertion and there is no evidence on the record that they ever made such an admission. The Court's statements in this regard are, thus, erroneous.

the jury to determine whether, in fact, any juror had read or discussed the editorial. Without polling the jury, which consisted of twelve jurors and two alternates, and absent any testimony regarding Mrs. Caucci's intent in submitting the editorial, the Court orally granted Plaintiffs' motion, declaring a mistrial and ordering Dr. Caucci to personally pay Plaintiffs' trial fees and costs. On February 4, 2005, the Court entered a Memorandum and Order, setting forth the grounds for its decision, formally declaring a mistrial[4] and ordering Dr. Caucci to personally pay Plaintiffs' trial fees and costs (the "Order").

B. ARGUMENT IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE THE COURT'S FEBRUARY 4, 2005 ORDER

In its Order, *the* Court relied on *Carter v. U.S. Steel Corp.*, 604 A.2d 1010 (Pa. 1992), to support its conclusion that Mrs. Caucci's editorial "was reasonably likely to cause prejudice." *February 4, 2005 Memorandum and Order*, at p. 5. As a result, the Court declared a mistrial and ordered Dr. Caucci to personally pay Plaintiffs' attorneys' fees. There was no evidence, however, that the jury was, in fact, exposed to the editorial. The Court's conclusion that the editorial was prejudicial, which provides the foundation for its subsequent Order, is, therefore, erroneous.

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4. This memorandum of law, Defendant's Motion to Strike This Court's February 4, 2005 Order, and Defendant's Motion for Recusal do not address the grant of a mistrial; Dr. Caucci seeks to strike only the aspects of this Court's order concerning attorneys' fees and for the Court to recuse herself from any further proceedings.

Moreover, the sanction, an award of Plaintiffs' attorneys' fees, was based on the Court's finding that the editorial was written "without reasonable or probable cause or excuse" and that it was intended to harass and annoy Plaintiffs. *See February 4, 2005 Memorandum and Order*, at p. 5. The Court reached this conclusion without any evidence regarding Mrs. Caucci's intentions and despite the editorial having been written for a proper purpose, unrelated to the instant malpractice action. The Court's conclusion that the elements of 42 Pa.C.S.A. § 2503(7) were met by the publication of the editorial was, therefore, speculation and an abuse of discretion.

Additionally, because the Order sanctions Dr. Caucci, ordering him to personally pay Plaintiffs' attorneys' fees, the Order is a conviction of indirect criminal contempt. *See Diamond v. Diamond*, 715 A.2d 1190, 1194 (Pa. Super. 1998)(discussing distinctions between contempt, generally). Dr. Caucci, however, was not afforded the procedural due process safeguards attendant to such a conviction. *See Id.* at 1196, n. 10 (concerning due process safeguards). Moreover, he was convicted on the basis of actions that were not his own and which are not attributable to him, and which, even if attributable to him, fail to rise to the level necessary to sustain such a conviction. *See id.* at 1196 (noting burden of proof and elements of contempt). Thus, his conviction cannot stand.

Finally, the Court's Order was issued solely in response to the publication of the editorial, a form of speech. The Order was directed at the content of the speech and acts, in effect, as a retroactive gag order on speech concerning a broad range

of important political issues. The Order is, thus, unconstitutional as it infringes upon the protections guaranteed by the First Amendment.

For these reasons, Dr. Caucci respectfully requests that the Court rescind its February 4, 2005 Order to the extent it orders him to pay Plaintiffs' attorneys' fees.[5]

1. Absent evidence that the jury was actually exposed to the allegedly prejudicial publication, the Court's conclusion that the editorial was prejudicial, which forms the basis for its subsequent Order, was erroneous.

The Order was based upon the Court's conclusion that the editorial was "reasonably likely to cause prejudice." *February 4, 2005 Memorandum and Order*, at p. 5. This conclusion, however, was erroneous absent proof that the jury, in fact, read and/or discussed the publication. *Carter*, mistakenly relied upon by the Court in its Order, supports this conclusion.

In *Carter*, a newspaper article and television news broadcast, discussing the personal injury action under consideration, were published during jury deliberations, 604 A.2d at 1012. 13. After the jury returned its verdict, the trial court interviewed each juror individually, inquiring into whether the juror had read the article and/or viewed the broadcast and, if so, what influence the publications had on their decision-making. *Id.* at 1013. This inquiry revealed that,

5. It is clearly too late to contest the mistrial and, therefore, Dr. Caucci does not seek relief from the Court in this regard.

while none of the jurors had read the article, two of the jurors had seen the broadcast and discussed it during deliberations, *Id.* On the basis of this testimony, the trial court vacated the jury's verdict and ordered a new trial. *Id.* at 1012.

On appeal, the Supreme Court of Pennsylvania held that "testimony as to the subjective reasoning processes of the jurors is inadmissible," but that testimony concerning the jurors' overt conduct, i.e. whether they read the article or viewed the broadcast, was properly admitted. *Id.* at 1014-15. Thus, the Court recognized a narrow exception to the "no impeachment rule," permitting a juror to "testify only as to the *existence of the outside influence*, but not as to the effect this outside influence may have had on the deliberations." *Id.* at 1013 (*citing Commonwealth v. Zlatovich*, 269 A.2d 469 (Pa. 1970)(emphasis added). In accordance with this reasoning, the Court stated, "[O]nce the existence of a potentially prejudicial extraneous influence has been *established by competent testimony*, the trial judge must assess the prejudicial effect of such influence." *Id.* at 1016 (emphasis added). Thus, proof that a jury is actually exposed to an allegedly prejudicial publication is a prerequisite for finding that the jury was tainted and for any subsequent remedial action. *See id.*; *see also Pratt v. St. Christopher's Hospital*, 2005 WL 121552, *1 (Pa.) and *Rohm & Haas Co. v. Continental Casualty Co.*, 2002 WL 434617, *1 (Pa. Com. Pl.)(involving actual evidence of jury's exposure to alleged taint). In other words, for a court to conclude that a jury has been tainted, the evidence must not only establish that the allegedly prejudicial publication exists, but also that it exists as an "outside influence," which requires that the jury actually be exposed to the publication. *See Carter*, 604 A.2d at 1016.

Appendix A

During the January 19, 2005 hearing, Mr. McGrath asked the Court to poll the jury to see if, in fact, they had been tainted by the publication of the editorial. *See Transcript of January 19, 2005 Hearing*, at p. 7-8. With two alternates, and a panel of twelve jurors, there was ample opportunity to eliminate any juror that confessed to being influenced. Without polling the jury and without any evidence that the jury had actually been exposed to the editorial, other than mere conjecture, the Court erroneously entered the Order. *See Transcript of January 19, 2005 Hearing*, at pp. 7-10. The Court misreads *Carter*, ignoring the Supreme Court's requirement that the allegedly prejudicial publication must be shown as an actual outside influence over the jury. *See February 4. 2005 Memorandum and Order*, at pp. 4-5. The Court infers from the mere existence of the editorial that the jury has been exposed to it and prejudiced by it, despite the fact that the editorial appeared only after the Court instructed the jury not to read anything relevant to the case. Accordingly, because the Court's Order is based on its misreading of *Carter* and its conclusion that the jury was tainted, the Order is erroneous. Dr, Caucci, therefore, respectfully requests that the Court rescind its February 4, 2005 Order to the extent it orders him to pay Plaintiffs' attorneys' fees.

2. The editorial was written for a proper purpose, unrelated to the malpractice action, and, therefore, the Court's conclusion that it was vexatious was an abuse of its discretion.

The Court awarded Plaintiffs' attorneys' fees on the basis of its assumptions that the editorial was written "without reasonable or probable cause or excuse" and that it was intended to harass and annoy Plaintiffs. *See February 4, 2005 Memorandum and Order*, at p. 5. This conclusion, however, in the absence of any evidentiary basis, was an abuse of discretion as there was no evidence indicating that the editorial was written for an improper purpose and, in fact, the editorial was unrelated to the pendency of the malpractice litigation.

In American jurisprudence, the general rule is that a party to litigation is responsible for its own counsel fees and costs, absent, among other exceptions, statutory authority. *See Cher-Rob, Inc. v. Art Monument Co.*, 594 A.2d 362, 363 (Pa. Super. 1991). Pursuant to 42 Pa.C.S.A. § 2503(7), however, a party may be "awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter." This statute is interpreted narrowly using "strict definitional guidelines," so as not to punish the innocent. *See Thunburg v. Strause*, 682 A.2d 295, 300 (Pa. 1996). A party is said to act "vexatiously" when it acts "without sufficient grounds in either law or in fact" or with "the sole purpose of causing annoyance." *Id.* at 299. Only acts that relate to the "pendency of an action" may give rise to an award of attorneys' fees under 42 Pa.C.S.A. § 2503(7). *See Cher-Rob*, 594 A.2d at

364. The party seeking counsel fees bears the burden to prove its entitlement to such fees under one of the statutory exceptions. *See Berg v. Georgetown Builders, inc.*, 822 A.2d 810, 816 (Pa. Super. 2003).

Initially, it must be noted that the Court's award of attorneys' fees is inappropriate because Mrs. Caucci was not, and is not, a party to this litigation. In addition, in its Order, the Court concludes, "[t]here is no doubt that the content of the letter published in a newspaper whose general circulation is primarily it Lackawanna County on the evening of the first day of trial by the Defendant's wife was vexatious. This is especially true in light of the fact that the Defendant was aware that the letter could taint the jury and was fully aware that its content addressed issues which would be decided at trial," *February 4. 2005 Memorandum and Order*, at p. 5. It reached this conclusion despite the absence of any evidence indicating either that Dr. or Mrs. Caucci intended to annoy or harass the Plaintiffs or that the editorial was directed at the Plaintiffs and the instant malpractice action. Moreover, the Court concluded that the editorial was vexatious when, in fact, there was a proper purpose for the article, unrelated to the malpractice litigation. That is, Mrs. Caucci regularly contributes editorials to the *Scranton Times* in her capacity as Clarks Summit President of the Lackawanna County Medical Society Alliance and the editorial at issue was intended as a response to misstatements contained in the Falk article. Finally, the Court erroneously relied upon the editorial as the basis of an award of attorneys' fees under 42 Pa.C.S.A. § 2503(7) despite the fact that the editorial was unrelated to the pendency of the malpractice litigation and was not written by any party to the case. That is, the editorial was neither a

pleading, nor a discovery request that would vex Plaintiffs, causing them to expend legal resources in response; rather, it was a newspaper submission relevant to the public discourse on the issue of tort reform, which required no response in this litigation. For these reasons, the editorial was not vexatious and, because there is no evidence to support such an assumption, the award of attorneys' fees cannot stand. Accordingly, Dr. Caucci respectfully requests that the Court strike its Order to the extent it impermissibly awards Plaintiffs' attorneys' fees as a sanction for publication of the editorial.

3. The Order convicts Dr. Caucci of indirect criminal contempt, however, be was not afforded the procedural due process safeguards attendant to such a conviction.

The Order, which describes Dr. and Mrs, Caucci's actions as "calculating and contemptuous," *February 4. 2005 Memorandum and Order*, at p. 6, imposes an unconditional fine on Dr. Caucci in the form of Plaintiffs' attorneys' fees. The Order evidences the Court's intent to punish Dr. Caucci for his wife's publication of the editorial and, therefore, it is a finding of indirect criminal contempt. Such a conviction requires that certain procedural safeguards be followed and, because all of these safeguards were omitted, Dr. Caucci's conviction cannot stand.

The distinction between criminal and civil contempt rests on whether the dominant purpose of the sanction is coercion or punishment. *See In re Martorano*, 346 A.2d 22, 28 (Pa. 1975). "A civil adjudication of contempt coerces with a

conditional or indeterminate sentence of which the contemnor may relieve himself by obeying the court's order, while a criminal adjudication of contempt punishes with a certain term of imprisonment or fine which the contemnor is powerless to escape by compliance." *Id.* (*citing Shillitani v. United States*, 384 U.S. 364, 368-70 (1966)). Simply put, "in a civil contempt order[,] the contemnor is able to purge himself of the contempt by future conduct and[,] thus[,] holds the keys to the jailhouse door." *Diamond v. Diamond*, 715 A.2d 1190, 1194 (Pa. Super. 1998)(citing *Colbert v. Gunning*, 533 A.2d 471, 472 (Pa. Super. 1987)). In a criminal contempt, on the other hand, punishment is both "certain and beyond the (contemner's] power to escape." *Id.* The Order awarding Plaintiffs' attorneys' fees was both unconditional and beyond Dr. Caucci's power to escape through future conduct; its dominant purpose was to punish Dr. Caucci for the publication of the editorial. The contempt is, therefore, properly classified as criminal.

Whether a criminal contempt is direct or indirect depends on where the alleged contemptuous act occurred. See *Commonwealth v. Ashton*, 824 A.2d 1198, 1202-03 (Pa, Super. 2003). "A charge of indirect criminal contempt consists of a claim that a violation of an order or decree of court occurred outside the presence of the court." *Id.* at 1203 *(citing Commonwealth v. Baker*, 722 A.2d 718, 720 (Pa. Super. 1998)). A direct criminal contempt, on the other hand, concerns a "misbehavior that takes place in the presence of the court, thereby obstructing the administration of justice." *Id.* at 1202. The alleged contemptuous act, in this case, was Mrs. Caucci's writing the editorial and submitting it to the *Scranton Times for* publication a week before the trial, an

act taking place outside the presence of the court and before the start of trial. There was no outstanding Order of the Court, however, directed at Mrs. Caucci, a non-party. This Court's Order, then, is one of indirect criminal contempt, but directed against the wrong party and without a prior Order; there was no conduct in violation of a court order and, thus, no contempt was committed.

The civil-criminal, direct-indirect distinctions "exist solely for determination of a contemnor's procedural rights and a court's sentencing options." *Martorano*, 346 A.2d at 29. "Quite simply, a contemnor who will be sentenced to . . . a fixed fine, which he is powerless to escape by purging himself of his contempt, is entitled to the essential procedural safeguards that attend criminal proceedings generally." Id. "With regard to indirect criminal contempt, these procedural safeguards include: . . . the right to be notified of the specific accusations against him . . . , a reasonable time to prepare a defense, the assistance of counsel, and the right, upon demand, to a speedy and public trial before a jury." *Ashton*, 824 A.2d at 1203. "A colloquy at which the contemnor may argue his ... position is not sufficient to satisfy the strict procedural due process requirements that apply prior to a conviction for indirect criminal contempt." *Id.* At the January 19, 2005 hearing, wherein the oral order of contempt was issued, the Court failed to afford Dr, Caucci reasonable notice of the charge against him, a reasonable time to prepare a defense, the opportunity to obtain separate counsel conversant in criminal matters, and the opportunity to request a jury trial. The colloquy of counsel that took place during that hearing was insufficient, as a matter of law, to sustain Dr. Caucei's conviction for indirect criminal contempt.

Furthermore, the Court advised Mr. McGrath, the defense counsel retained by Dr. Caucci's insurance company, that the company could not pay the fine and, in effect, terminated counsel's representation of Dr. Caucci. At no time did the Court put any questions to Dr, Caucci or his defense counsel as to Dr. Caucci's alleged intent to taint the jury so that he could deny the allegation. In the absence of questions or the opportunity for a hearing, no response was permitted to him, Moreover, the Court's demeanor precluded any opportunity for Dr. Caucci to retain defense counsel and appropriately respond. His silence, under the circumstances, is not an admission of wrongdoing, especially in light of the 5th Amendment's protection of a defendant's right to silence, *See* U.S. CONST. AMEND. V. The Court's statements to the contrary are, thus, improper.[6]

Dr. Caucci, therefore, respectfully requests that this Court rescind its Order to the extent it holds Dr. Caucci in indirect criminal contempt by ordering him to pay Plaintiffs' attorneys' fees.

4. Dr. Caucci was convicted on the basis of actions that were not his own and which, even if attributed to him, do not rise to the level necessary to sustain an indirect criminal contempt conviction.

It is axiomatic that guilt, in the criminal sense, is personal. In this regard, a person cannot be convicted of a crime on the basis of another's conduct, without more. The sole basis for the Court's Order, however, was the editorial

6. *See* Note 3.

written and submitted by Mrs. Caucci; there was no evidence introduced that Dr. Caucci wrote the editorial or caused its publication. In addition, Mrs. Caucci was not a party to the malpractice action; rather, Dr. Caucci was defending the case solely in his professional capacity. Accordingly, and in light of the absence of a prior order violated by either Dr. or Mrs. Caucci, the Order was improper. Dr. Caucci respectfully requests, therefore, that the Order be stricken.

To the extent that the editorial can be attributed to Dr. Caucci, which is denied, the editorial, without more, does not rise to the level of culpability necessary to sustain an indirect criminal contempt conviction. To support such a finding, the evidence must demonstrate beyond a reasonable doubt that Dr. Caucci's conduct was criminal. *See Diamond*, 715 A.2d at 1196. In the first instance, there was no outstanding order that would have prohibited Mrs. Caucci's submission of the editorial. To the extent that the publication of the editorial can be seen as violating the Court's general instructions regarding trial, however, such publication does not rise to the level of culpability necessary to convict Dr. Caucci of indirect criminal contempt for two reasons.

First, the article was written and submitted before the Court had issued any instructions and Mrs. Caucci was never informed of such instructions as she was not a party to the case. Her submission of the editorial, therefore, did not violate any court order. Second, "[f]our elements must be present to support a finding of criminal contempt for failure to comply with a court order: (1) the order must be definite, clear, specific and leave no doubt or uncertainty in the mind of the person to whom it was addressed of the conduct

prohibited; (2) the contemnor must have had notice of the specific order or decree; (3) the act constituting the violation must have been volitional, and (4) the contemnor must have acted with wrongful intent." *Id.* It must be also proven "that the alleged contemnor's failure to comply with the order was willful or at least reckless." *Id.* Clearly, no evidence to support any of these elements was adduced at the January 19, 2005 hearing, as no testimony was taken. Moreover, these standards were never met in light of the following: (1) there was no clear and uncertain order prohibiting publication of the editorial, (2) Dr. Caucci did not write the editorial or cause its publication, and (3) there was no evidence to suggest that either Dr. or Mrs. Caucci acted willfully or recklessly or with an improper intent. Thus, the evidence before the Court was insufficient, as a matter of law, to support Dr. Caucci's conviction of indirect criminal contempt.

5. The First Amendment protects the editorial that prompted the Court's Order.

The Constitution of the United States and that of the Commonwealth of Pennsylvania specifically guarantee the freedom of speech. *See* U.S. CONST. amend. I and PA. CONST. art. I, § 7. All citizens have the right to engage in political speech and to persuade their fellow citizens on matters of pending legislation and political action. *See Mills v. Alabama*, 384 U.S. 214, 218-19 (1966)(noting universal agreement that a major purpose of First Amendment was to protect political speech). "The Constitution specifically selected the press, which includes . . . newspapers, to play an important role in the discussion of public affairs." *Id.* at 219. The Supreme Court has held that gag orders, issued to protect the fairness

of trial, are prior restraints on speech and, therefore, unconstitutional. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565 (1976). Additionally, the high court has held that state action infringing upon political speech is subject to strict scrutiny, upheld only where the regulation is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *See Burson v. Freeman*, 504 U.S. 191, 197 (1992).

The Order, which punishes Dr. Caucci for his wife's expression of her political views on the subject of tort reform, does not pass the strict scrutiny test and, therefore, it is unconstitutional. Moreover, the Court cannot retroactively impose a gag order to protect the fairness of trial when it would not be permitted to do so prospectively. The Order has a "chilling effect" on every citizen who wants to voice their views on a manner of pending legislation such as tort reform and the malpractice insurance crises; and, therefore, it cannot stand. In light of the First Amendment's guarantees, Dr. Caucci respectfully requests that this Court strike its Order, awarding attorneys' fees as a sanction for the publication of the editorial.

C. ARGUMENT IN SUPPORT OF DEFENDANT'S MOTION FOR RECUSAL.

"An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity of and independence of the judiciary may be preserved." *Code of Judicial Conduct*, Canon 1. "A judge

should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including . . . where . . . he has a personal bias or prejudice concerning a party." *Code of Judicial Conduct*, Canon 3(C)(1)(a).

The Court's Order is intemperate in tone, makes false statements that Dr. and Mrs. Caucci admitted wrongdoing, and, by unfounded assumptions, grossly mischaracterizes Dr. Caucci's conduct and Mrs. Caucci's motivation. *See February 4, 2005 Memorandum and Order*, at p. 3-6. Under these circumstances, Dr. Caucci respectfully requests that, upon striking its Order, the Court recuse herself from any further proceedings in this case.

III. CONCLUSION

For the foregoing reasons, Defendant, David J. Caucci, M.D., respectfully requests that the Court rescind the Order entered against him and recuse herself from any further proceedings in this case.

s/ James L. Griffith
James L. Griffith, Esquire
FOX ROTHSCHILD LLP
2000 Market Street, 10th Floor
Philadelphia, PA 19103
(215) 299-2000

Attorneys for Defendant,
David J. Caucci, M.D.

Dated:

APPENDIX B — ORDER OF THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY DATED AUGUST 5, 2005

IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY

CIVIL — JURY TRIAL

No. 2001 CIV 1661

LAWRENCE MEKIC and LOUISE MEKIC,

Plaintiffs,

VS.

DAVIS J. CAUCCI. M.D.,

Defendant,

ORDER

AND NOW, on this 5th day of August, 2005, **IT IS HEREBY ORDERED, ADJUDGED and DECREED** that in compliance with this Court's oral order contained in the record of January 19th, 2005. Defendant is ordered to pay $13,286.50 in costs derived from Plaintiffs' trial and preparation there of as itemized in the attachment submitted by Michael J. Foley, Esquire. Per agreement of the parties Plaintiffs' attorney's fees shall be waived.

IT IS ORDERED:

s/ Trish Corbett
Trish Corbett, Judge

APPENDIX C — MOTION FOR RECONSIDERATION DATED AUGUST 30, 2005 AND ORDER DATED AUGUST 5, 2005

IN THE COURT OF COMMON PLEAS OF LACKAWANNA

CIVIL ACTION — LAW

JURY TRIAL DEMANDED
NO. 2001-CIV-1661

LAWRENCE F. MEKIC and
LOUISE MEKIC, his wife,

Plaintiff(s)

vs.

DAVIS J. CAUCCI, M.D.,

Defendant(s)

MOTION FOR RECONSIDERATION OF THIS HONORABLE COURT'S ORDER OF AUGUST 5, 2005

NOW COME THE PLAINTIFFS, by and through their counsel, Foley, McLane, Foley, McDonald & MacGregor, P.C., and hereby move this Honorable Court to reconsider or modify this Honorable Court's Order of August 5, 2005, and in support thereof, aver as follows:

1. On August 5, 2005, the Honorable Trish Corbett issued the following Order in the above-referenced case:

> And now, on this 5 day of August, 2005, it is hereby Ordered, Adjudged and Decreed that in compliance

with this Court's oral Order contained in the record of January 19, 2005, the Defendant is Ordered to pay $13,286.50 in costs derived from Plaintiffs' trial and preparation thereof, as itemized in the attachment submitted by Michael J, Foley, Esq. Per agreement of the parties, Plaintiffs' attorneys' fees shall be waived,

It is so Ordered:

/s/ Trish Corbett, J.

A copy of the Order is attached hereto as Exhibit A,

2. Prior to the issuance of the Court's Order, the undersigned counsel, Michael J. Foley, received a telephone call from the Honorable Trish Corbett, advising that counsel for Dr. Caucci, James L. Griffith, had contacted her and advised that the insurance carrier would pay the costs, but not the attorneys' fees, if that was an acceptable resolution of the issue. Based upon that understanding, Plaintiffs agreed to accept payment of the costs that were listed in Plaintiffs' February 10, 2005, letter, and withdrew their claim for counsel fees, conditioned on the fact that Dr. Caucci, through his insurance carrier, would pay the costs,

3. On or about August 5, 2005, Plaintiffs forwarded a copy of the February 10, 2005 letter to the Honorable Trish Corbett, copying counsel for Dr. Caucci.

4. On August 5, 2005, the Honorable Trish Corbett issued the above-referenced Order.

Appendix C

5. Despite the passage of several weeks and multiple communications, counsel for Dr. Caucci has not been able to procure a check for the agreed-upon amount.

6. Given the foregoing, Plaintiffs' counsel respectfully requests this Honorable Court to review and/or reconsider the Order and to award Plaintiffs counsel fees in addition to the costs, in accordance with the Court's initial January 19, 2005 Order. Plaintiffs' counsel only agreed to the disposition of the matter based upon the representations to Plaintiffs' counsel that Attorney Griffith had represented to the Court that they had authority to resolve the matter for the costs, which were in the amount of approximately $13,000.00.

7. An August 26, 2005 communication from Attorney Griffith indicates that he will be discussing the mater with AIG, a carrier for Dr. Caucci, later this week.

WHEREFORE, in an abundance of caution, the Plaintiff respectfully requests this Honorable Court to reconsider and/or to modify its Order of August 5, 2005 to include attorneys' fees, as set forth in the February 10, 2005 letter to the Court if Dr. Caucci does not pay the agreed-upon amount as Ordered in the August 5, 2005 Order.

Respectfully submitted,

Foley, McLane, Foley, McDonald
& MacGregor, P.C.
Attorneys for Plaintiff

By: s/ Michael J. Foley
Michael J. Foley, Esq.

Appendix C

IN THE COURT OF COMMON PLEAS
OF LACKAWANNA COUNTY

CIVIL — JURY TRIAL

NO. 2001 CIV 1661

LAWRENCE MEKIC and LOUISE MEKIC,

Plaintiffs,

VS.

DAVIS J. CAUCCI. M.D.,

Defendant.

ORDER

AND NOW, on this 5th day of August, 2005, **IT IS HEREBY ORDERED, ADJUDGED and DECREED** that in compliance with this Court's oral order contained in the record of January 19th, 2005, Defendant is ordered to pay $13,286.50 in costs derived from Plaintiffs' trial and preparation there of as itemized in the attachment submitted by Michael J. Foley, Esquire. Per agreement of the parties Plaintiffs' attorney's fees shall be waived.

IT IS SO ORDERED:

s/ Trish Corbett
Trish Corbett, Judge

APPENDIX D — ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA DATED DECEMBER 8, 2005

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 1512 MDA 2005

C.P. LACKAWANNA COUNTY 1661-2001

LAWRENCE F. MEKIC AND LOUISE MEKIC

v.

DAVID J. CAUCCI, M.D.

ORDER

The court hereby **GRANTS** the motion to quash/dismiss

PER CURIAM

Date: DEC 08 2005

APPENDIX E — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT DENYING PETITION FOR ALLOWANCE OF APPEAL DATED JUNE 22, 2006

IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

No. 193 MAL 2006

Petition for Allowance of Appeal from the Order of the Superior Court

LAWRENCE F. MEKIC AND LOUISE MEKIC,

Respondents

v.

DAVID J. CAUCCI, M.D.,

Petitioner

ORDER

PER CURIAM

AND NOW, this 22nd day of June 2006, the Petition for Allowance of Appeal is hereby **DENIED**.